IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.403 OF 2007

Afzal Saudagar ...Petitioner
Vs.
Jt. Secretary to the Govt.
of India & Ors. ....Respondents

Mr.R.G.Merchant with Mr. Swapnil Wagh for Petitioner

Mr. R.M.Agrawal with Mr.Mandar Goswani for Respondent No.1 and 2 Union of India

Mr. A.R. Patil, Addl.P.P for Respondent No.3 and 4 State

CORAM: DR. S. RADHAKRISHNAN &
SMT.ROSHAN DALVI, JJ.
Date of Reserving the Judgment : 23rd October, 2007
Date of Pronouncing the Judgment: 13th December, 2007

JUDGMENT (Per Smt. Roshan Dalvi,J.)

1. The Petitioner has applied for issuance of the writ of Habeas Corpus and to quash and set aside the order of detention dated 29th January, 1999 bearing No.673/4/99-Cus.VIII passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities

Act, 1974 (COFEPOSA).

2. The order of detention is passed on the basis that the Petitioner purchased foreign currency from bulk dealers of foreign exchange and disposed off the same in black market instead of issuing it to genuine travellers under the BTQ scheme of the Reserve Bank of India. The order also shows that the Petitioner had been issued Full Fledged Money Changer (FFMC) Licence. One M/s. U.K.Picturewala & Sons carried on the business from Shop No.7, Bunder Building, 241, SVP Road, Dongri, Mumbai-400 009 and kept the documents pertaining to the said business in the premises of one M/s. Adam Enterprises, at Shop No.2, 197, SVP Road, Zohar Manzil, Dongri, Mumbai-400 009. It shows how the Petitioner was admitted to the partnership of the said M/s. U.K. Picturewala and Sons and carried on the said business from 13th December, 1996 until 2nd July, 1997 soon after which his license was canceled on 24th July, 1997. It shows that the Petitioner disposed of foreign exchange in black market to the extent of Rs.13,79,31,157/- purchased by him from certain 5 bulk dealers, whose names are mentioned in the detention order.

3. The Petitioner's premises was raided on 29th September, 1997. He was arrested on 30th September, 1997 and

produced for remand on the next day before the Additional Chief Metropolitan Magistrate, Mumbai, when he was remanded to Judicial Custody. On his application for bail dated 1st October, 1997 he was released on bail on 6th October, 1997. The case came to be investigated. Statements of several persons including the Petitioner were recorded, the Petitioner was issued a show-cause notice on 25th September, 1998 by the Special Director of Enforcement after the investigation was completed.

4. More than 4 months after the said show-cause notice the impugned Detention Order came to be passed on 29th January, 1999 alleging that the Petitioner has been engaging himself in unauthorised transactions in violation of the provisions of Foreign Exchange Regulation Act, 1973 (FERA) and that those transactions effected the foreign exchange reserves of the country adversely and that the Petitioner has been indulging in such prejudicial activities which reflected high potentiality and propensity to continue such activities in future so that order of detention was necessitated to be passed against him.

5. It is contended on behalf of the Petitioner that there has been a gross delay of 4 months in passing the detention order after the issuance of the show cause notice to the

Petitioner on 25th September, 1998 after the completion of the investigation of the case against him. Similarly it is contended that there has been a gross delay of 6 years in executing the detention order upon the Petitioner though the Petitioner was available at his address.

6. Prosecution of the Petitioner under Section 57 of the FERA has been separately made under the complaint/application dated 22nd May, 2002.

7. It is further contended on behalf of the Petitioner that whatever be the case against the Petitioner with regard to the misuse of the FFMC License by obtaining foreign exchange from authorised dealers and selling it in black market instead of it giving to the bonafide passengers, the Petitioner's license itself came to be cancelled (presumably on account of his misconduct) on 24th July, 2007. The Respondents concede that thereafter no further similar transactions by the Petitioner were noted. It is contended on behalf of the Petitioner that it will be impossible for him to continue his business, even in black market, without the license issued by the Reserve Bank of India. Consequently more than a year later when the detention order came to be passed the proneness and the propensity of the Petitioner to continue the said business has not been shown by the

Respondents. It is therefore, contended that the detention order is not sustainable upon the subjective satisfaction of the detaining authority mentioned therein for want of any evidence of misconduct in the said business by the Petitioner.

8. The Petitioner is stated to have been absconding all through since the years 1999 when the detention order was passed.

9. It is the Respondent's case that they have sought to serve the detention order upon the Petitioner on various dates mentioned in para 3 of the **affidavit** in reply of the Inspector of Police, Kurar Police Station. However, it is contended that the Petitioner was not found and hence a notification dated 18th March, 1999 under Section 7(i)(b) of COFEPOSA was issued. A copy of the said notification came to be pasted on the premises of the Petitioner on 21st April, 1999.

10. The Petitioner is stated to have been at large since April, 1999 until 7th December, 2006 when, upon receipt of intelligence reports, the Petitioner came to be apprehended and arrested and the detention order came to be executed.

11. It is the case of the Petitioner that he has not been

absconding. It is his case that he continued to reside at the premises which was his address and at the new premises to which he shifted thereafter. Since the Petitioner is stated to have been absconding and the notification in the official gazette came to be issued directing the Petitioner to appear before the Officer mentioned therein, the onus lies upon the Petitioner to prove his whereabouts and show how he could not comply with the said notification within the period specified therein. The Petitioner has sought to discharge that onus by documentary evidence as defined in Annexure-G to his Petition, upon the case that he has not been absconding and had no knowledge of the said notification which was not pasted upon his residential premises.

12. The documentary evidence of the Petitioner is first required to be considered to see whether or not he could be taken to be absconding since the time of the detention order. The documents relied upon by the Petitioner and the necessary remarks relating to the documents would be required to be considered separately.

Pre-detention order period:

Sr.No.	***Documents***	***Remarks***
1	Driving License of the Petitioner issued in September, 1986, which is extended in 2001.	This shows prima facie the initial presence of the Petitioner in Mumbai.
2	Ration card of the Petitioner bearing No.209216 issued on 21.7.1989.	This is issued well before the raid.
3	Passport of the Petitioner dated 28th September, 1994	This is well before the raid.
4	Electoral Roll	The year of the roll is not seen. However, the names of the Petitioner and his family members would continue to appear in the Electoral Roll until the Petitioner's changed address is notified.
5	Election ID card issued to the Petitioner on 8th January, 1995.	This was issued 2 years prior to the raid.
6	Gas Connection in the name of the Petitioner dated 18th December, 1996.	This is also before the raid.

Sr.No.	***Documents***	***Remarks***
7	One bill of the Petitioner's telephone of MTNL	This bill is sent in the normal course at the address where the Petitioner resides. The bill which is from 1.10.1997 to 1.12.1997 has recorded only 16 calls. This was the period of his bail application.
8	Rent Receipts in the name of the Petitioner for the years 1997 and 2003	These rent receipts can continue to be issued upon payment of the rent by any other person whether or not the Petitioner resides in the tenanted premises.
9	Letter of the Regional income tax department issuing Pan Number to the Petitioner dated 2nd September, 1997.	This was a few days prior to the raid on the Petitioners premises. This shows that the Petitioner obtained Pan card a few days before the raid and after his FFMC licence was cancelled.
10	PAN Card	The date of its issue is not visible.

Sr.No.	***Documents***	***Remarks***
11	Medical prescription of Doctor of the Petitioner dated 26th December, 1998 and 2nd March, 1999.	The prescription shows various dates of attendance and reports during aforesaid period. This shows physical availability of the Petitioner between December, 1998 and March, 1999 in the area. This period is a little prior to and after the detention order.
	Post Detention Order	**Period :-**
12	Case papers of the Petitioner for medical treatment taken by the Petitioner in J.J. Hospital dated 11.10.1997, 23.4.1999, 30.4.1999, 2.5.1999, 8.5.1999, 21.5.1999, 8.10.1999 for ultrasound examination report of the Petitioner in J.J. Hospital.	This shows the physical presence of the Petitioner in that hospital, soon after the detention order.
13	Letter of the Petitioner dated 5th March, 1999 to the MTNL for closing his telephone account.	This is soon after the detention order is issued.
14	Letter dated 17th March, 1999 to MTNL to carry out the work order.	This is soon after the detention order is issued.

Sr.No.	***Documents***	***Remarks***
15	Unregistered Agreement of Leave and License dated 26th June, 1999 executed by the Petitioner as a Licensor in favour of the third party.	This is six months after the detention order is passed. Stamp paper is purchased in the name of the Petitioner The agreement is notarised somewhere near the residence of the Petitioner. This document, at best, shows the Petitioner's presence in the area. The document does not show the Serial Number of the Notarial register entry since that was not a mandatory requirement under the Notaries Act at the time of its execution.
16	Notice dated 28th February, 2000 sent by the Advocate of the Petitioner on his behalf with regard to his shop premises, used and occupied by the third party.	This letter is signed by the Advocate. Reverse of the document also shows the signature of the Petitioner which could be put at any time. Instructions to the Advocate to draft the reply can be given telephonically also. It does not need the presence of the Petitioner.

Sr.No.	***Documents***	***Remarks***
17	Letter dated 2nd July, 2001 of the Petitioner's Advocate to the Deputy Director, Enforcement Department, Mumbai on behalf of the Petitioner requesting a copy of the adjudication order.	This shows the Petitioner actively defending the adjudication proceedings before the Enforcement Officer. However, he can instruct his Advocate even whilst absconding.
18	Receipt showing the purchase of a car by the Petitioner on 16th March, 2003 and the receipt of the BMC for payment of tax dated 28th February, 2003. AND The Registration Certificate of the Motor car purchased by the Petitioner dated 28th February, 2003 and signed by the Petitioner. AND Certificates of Insurance of the Car for the year 2003 and 2004.	The presence of the Petitioner before the R.T.O at that time is not required. Both show the address of the Petitioner. (Which is now seen to be his old address).

Sr.No.	***Documents***	***Remarks***
19	One medical policy of LIC of the Petitioner applied for on 25th August, 2003.	This only shows that it is issued in the name of the Petitioner. The application made by the Petitioner or the premium paid by the Petitioner are not shown.
20	Letter of the LIC for payment of the first premium and the first premium receipt dated 28th August, 2003.	This does not show whether the Petitioner himself made the payment.
21	Electricity bill of the Petitioner for the period of October to December, 2003	This shows the current meter reading of only 129 units for 2 months. It does not reflect continuous use, occupation and possession of the Petitioner and his family as before.
22	Bill for water connection of the BMC in the name of the Petitioner dated 10th January, 2004 obtained at the Petitioner's old address.	This can be issued upon payment by any one on behalf of the Petitioner without verifying the presence of the Petitioner.

Sr.No.	***Documents***	***Remarks***
23	Telephone bills of TATA Indicom of September, 2004 in the name of Petitioner's wife at their old address.	This shows that the Petitioner's address was changed some time at the end of December, 2003. It is not known whether that address was brought to the notice of the Respondents.
24	Letter sent on 18.12.2004 by the Petitioner's wife to Tata Indicom for change of Address.	This shows the Petitioner's residence address having been changed before this date.
25	New gas connection at the new address of the Petitioner dated 19th October, 2004	This shows the availability of the Petitioner at the new address.
26	Insurance Policies for the aforesaid car taken by the Petitioner for the years 2003 and 2004.	These show the continuation of the use of the car by the Petitioner during that period. They show the Petitioner's old address despite change of address.

Sr.No.	***Documents***	***Remarks***
27	Agreement of tenancy dated 19th October, 2004 executed by the Petitioner's wife.	This is an immaterial document. The Petitioner has signed this document as witness. The Original Agreement in the possession of the Licensee would show whether or not the Petitioner had signed as witness then. That document is not produced.
28	The receipt of the registration of the above document signed by the Petitioner's wife.	The receipt shows the Petitioner's name printed in the receipt as the witness to the document. That is signed by the Petitioner. This shows the availability of the Petitioner before the Sub-Registrar of Assurances for registration of said document in November, 2004.
29	New Ration Card of the Petitioner bearing No.079905 at the changed address.	This is issued in February, 2005 and is signed by the Petitioner. This document is in the custody of the Petitioner and hence, can be signed at any time before its xerox copy alone is produced in the Court.

Sr.No.	***Documents***	***Remarks***
30	Letter of the LIC dated 21st February, 2005 showing the changed address of the Petitioner in their records.	The address was changed in around December, 2004. It cannot be seen that the change was got effected by a letter signed by the Petitioner himself.
31	Discharge card of Prince Alikhan Hospital dated 25th April, 2005.	This shows surgery performed upon the Petitioner for April, 2005.
32	Another discharge card of the aforesaid hospital dated 24th August, 2006.	This shows further medical treatment taken by the Petitioner in August, 2006.
33	Affidavit of the Petitioner dated 15th February, 2006 for obtaining his domicile certificate.	This has been executed by the Petitioner showing his new place of residence.
34	Domicile Certificate issued in February, 2006.	The Certificate is issued by the Metropolitan Magistrate, 17th Court, Mazgaon Court, Mumbai inter alia based upon Ration Card No.311980, a ration card other than the aforesaid 2 ration cards.

13. Further, it is not known which address was given by the Petitioner to the Enforcement Directorate after his arrest and when his statement under Section 108 of the Customs Act was recorded. On going through these documents and

examining their contents, 2 addresses emerged. 3 ration cards have surfaced. His address has been admittedly changed during the period. Hence, the contention on his behalf that he was very much available for service, but not served the Detention Order could only be seen to have been made out if the initial address shown in his documents was made known by him to the Enforcement Directorate. We, therefore, called upon the Petitioner's Advocate to produce the entire documents served upon him with the Detention Order. 5 separate compilations marked Nos.2 to 6 were produced. The statement of the Petitioner made under Section 108 of the Customs Act being a part of Compilation No.1, was not produced despite the fact that a number of days has transpired since our query. It is impossible to ascertain the address given by the Petitioner where he could be served, and was served, the Detention Order. It is impossible to see that the documents produced by the Petitioner are of the same address. The Petitioner has accordingly, not discharged the onus that lies upon him under Section 7(1)(b) of COFEPOSA.

14. Hence, the Detention Order cannot be successfully challenged or faulted.

15. Petition is dismissed. Rule stands discharged.

16. The Petitioner's Advocate shall be returned compilations marked Nos.2 to 6.

(SMT. ROSHAN DALVI, J.) (DR. S. RADHAKRISHNAN, J.)